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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 791

IRENEE DU PONT, PETITIONER,

vs.

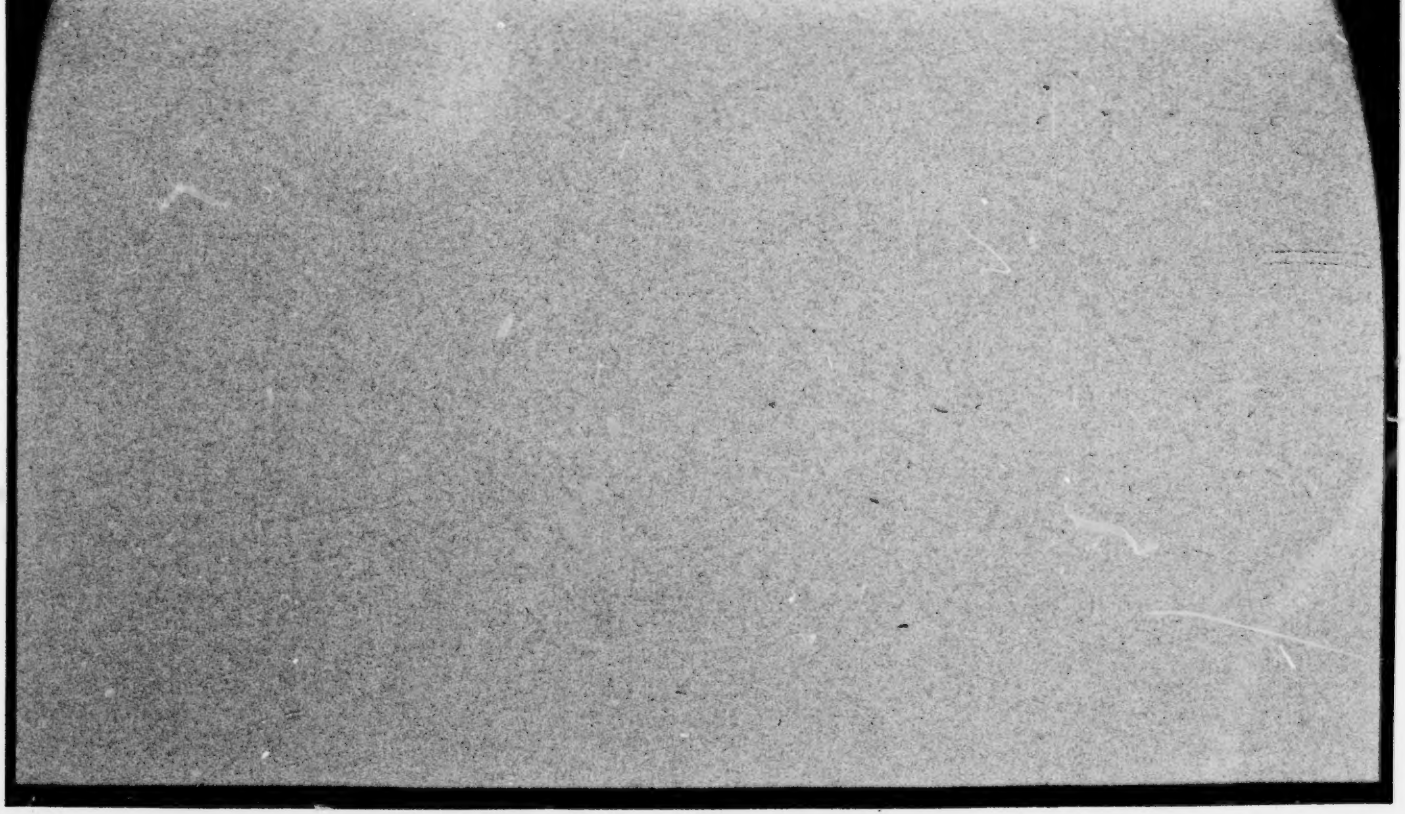
COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 20, 1933

CERTIORARI GRANTED MARCH 27, 1933

(37,488)



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INDEX

	Original	Print
Proceedings before U. S. Board of Tax Appeals	1	1
Docket entries	1	1
Petition	3	2
Exhibit A—Deficiency letter, dated September 8, 1928	7	4
Answer	15	9
Motion and amended answer	17	10
Findings of fact and opinion, Black, M.	19	11
Decision	25	16
Petition for review	26	16
Praecipe for record	31	19
Order enlarging time	33	20
Clerk's certificate (omitted in printing)	34	
Proceedings in United States circuit court of appeals, third circuit	35	20
Order assigning judges	35	20
Argument and submission (omitted in printing)	36	
Opinion, Davis, J.	37	21
Judgment	45	27
Clerk's certificate (omitted in printing)	46	
Order allowing certiorari	47	28

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[fols. a & 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 31468

IRENEE DU PONT, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances:

For taxpayer: Kingman Brewster, Esq.; J. S. Y. Ivins, Esq.

For Commissioner: F. Shearer, Esq.

DOCKET ENTRIES

Nov. 7, 1928. Petition received and filed. Taxpayer notified. (Fee paid.)

Nov. 8, 1928. Copy of petition served on General Counsel.

Jan. 9, 1929. Answer filed by G. C.

Jan. 9, 1929. Copy served on taxpayer. General Calendar.

Jan. 27, 1930. Hearing set 3/19/30.

Mar. 20, 1930. Transcript of hearing 3/19/30 filed.

Mar. 19, 1930. Hearing had before Mr. Black, Div. 15 on merits. Amended answer filed. Brief due 5/15/30.

[fol. 2]

May 15, 1930. Motion for extension of time to May 22, 1930, to file brief, filed by taxpayer.

May 15, 1930. Motion granted.

May 15, 1930. Order extending time for filing respondent's brief to May 22, 1930, entered.

May 19, 1930. Brief filed by G. C.

May 22, 1930. Brief filed by taxpayer.

Aug. 6, 1930. Findings of fact and opinion rendered. Eugene Black, Div. 15. Judgment will be entered for the respondent.

Aug. 7, 1930. Decision entered. Div. 15, Mr. Black.

Feb. 4, 1931. Motion to fix amount of bond, filed by taxpayer.

Feb. 4, 1931. Order fixing amount of bond at $50,000.00, entered.

Feb. 6, 1931. Supersedeas bond for $50,000.00 approved and ordered filed.

Feb. 7, 1931. Petition for review to U. S. Circuit Court of Appeals (3) with assignments of error filed by taxpayer.

Feb. 14, 1931. Proof of service filed.

Mar. 20, 1931. Motion for enlargement of time to 5/15/31 to prepare and transmit record filed by taxpayer.

Mar. 21, 1931. Order enlarging time to May 15, 1931, for preparation of evidence and delivery of record entered.

Apr. 28, 1931. Præcipe filed. Proof of service thereon.

[fol. 3] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION—Filed November 7, 1928

The above-named petitioner hereby applies for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (symbols IT:AR:B-4-HBA) dated September 8, 1928, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual with his address at Granogue, Delaware. His tax returns for the years herein involved were filed with the Collector of Internal Revenue at Wilmington, Delaware.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on or after September 8, 1928.

3. The taxes in controversy are income taxes and surtaxes for the calendar years 1924, 1925 and 1926, and for $50,000.

[fol. 4] 4. The determination of tax set forth in the said notice of deficiency is based upon the following error:

(a) The Commissioner has erroneously included in income for 1924 dividends of $50,422.40, for 1925 dividends of $50,370.10, and for 1926 dividends of $50,422.40, which were received by the Wilmington Trust Company, Trustee, under irrevocable trusts created by the petitioner in the year 1923 and used by the trustee in the payment of premiums on insurance policies on the life of the petitioner.

5. The facts upon which the petitioner relies as the basis of this proceeding are as hereinbefore stated and as follows:

(a) The petitioner herein, during 1923, entered into agreements with the Wilmington Trust Company, of Wilmington, Delaware, under the terms of which certain securities were transferred and delivered to the Wilmington Trust Company as trustee, the income from such securities to be used to pay premiums on insurance policies upon the life of the petitioner.

(b) The petitioner under the aforesaid trust agreements irrevocably divested himself for the terms of the trusts of the ownership and possession of the property so transferred, and could not avail himself of any of the gain therefrom.

(c) At the time the aforesaid trust agreements were entered into it was recognized that under the provisions of the Revenue Act of 1921, then in force, income used as aforesaid for the purpose of paying insurance premiums was taxable to the recipient of such income, i. e., the trustee.

[fol. 5] (d) During the year 1924 dividends from securities transferred amounting to $50,422.40 were received by the trustee and, pursuant to the terms of the trusts, were used to pay insurance premiums. During the year 1925 dividends amounting to $50,370.10 and during the year 1926 dividends amounting to $50,422.40 were so received and applied.

(e) The dividends as aforesaid were returned as taxable income for the respective years by the trustee, whereas the Commissioner in his deficiency notice heretofore mentioned, has added the dividends as taxable income to the petitioner.

Wherefore the petitioner prays that this board may hear the proceeding, reverse the error in the Commissioner's audit and redetermine such deficiency or overpayment for each year as the facts and law warrant.

Kingman Brewster, Counsel for Petitioner, c/o Holmes, Brewster & Ivins, 815 Fifteenth Street N. W., Washington, D. C.

[fol. 6] *Duly sworn to by O. R. Folsom-Jones. Jurat omitted in printing.*

[fol. 7] EXHIBIT "A" TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

September 8, 1928.

Mr. Irenee du Pont, Granogue, Delaware.

SIR: In accordance with Section 274 of the Revenue Act of 1926 you are advised that the determination of your tax liability for the years 1924, 1925 and 1926 discloses a deficiency of $33,632.90, as shown in the attached statement.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter for a redetermination of your tax liability. However, if you acquiesce in this determination, you are requested to execute the enclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7.

Respectfully, D. H. Blair by (S.) Wm. T. Sherwood,
Acting Deputy Commissioner.

Enclosures: Statement, Form 866, Form 882.

(Form 7928.)

[fol. 8] Statement

IT:AR:B-4. HBA-60D.

In re Mr. Irenee du Pont, Granogue, Delaware

Year	Deficiency in tax
1924	$16,955.37
1925	6,476.22
1926	10,201.31
Total	$33,632.90

The adjustments recommended in the reports of the Internal Revenue Agent in Charge, Baltimore, Maryland, have been approved with the following exceptions:

For the year 1925, the tax originally assessed was reported as $107,107.38, representing the original assessment of $109,194.07, less an overassessment of $2,086.69. Inasmuch as the records of this office disclose no overassessment previously allowed, the amount of $109,194.07 has been applied against your correct tax liability.

1924

Ordinary net income shown on return	$461,336.75
Add: 1. Increase in dividends	40,142.55
Ordinary net income adjusted	$501,479.30
Capital net gain reported	$2,549.90
Add: 2. Liquidating dividend	10,279.85
Capital net gain adjusted	$12,829.75

[fol. 9] Computation of Tax

Ordinary net income adjusted		$501,479.30
Less:		
Dividends	$531,819.58	
Personal exemption	2,800.00	
		534,619.58
Income subject to normal tax		None
Surtax on $501,479.30		$170,611.72
Tax at 12½% on $12,829.75		1,603.72
Total Tax		$172,215.44
Less: Tax paid at source		5.00
Tax assessable		$172,210.44
Tax previously assessed		155,255.07
Deficiency		$16,955.37

Explanation of Changes

1. Reference is made to your protests against the action of the examining officer in including in gross income dividends of $50,422.40, representing income received by the

Wilmington Trust Company, Trustee, under trusts created by you and used by the trustee in the payment of premiums on insurance policies covering your life.

You contend that none of the income of the trust should be included in your net income inasmuch as you did not at any time, alone or in conjunction with any person not a beneficiary of the trust, have the power to revest in yourself title to any part of the corpus of the trust; that the provisions of Secton 219 (h) of the Revenue Act of 1924 are not applicable to an irrevocable trust created prior to the passage of the Act; and that your case is analogous to that of a tax on transfers of assets.

[fol. 10] You are advised that Section 219 of the Revenue Act of 1924 contains no provision that it is applicable only to trusts or estates created subsequent to passage thereof; on the other hand; the section deals solely with the question of the taxability of income of estates or of any kind of property held in trust. Subdivision (h) of this section reads in part as follows:

"Where any part of the income of a trust is or may be applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in paragraph (10) of subdivision (a) of section 214), such part of the income of the trust shall be included in computing the net income of the grantor."

The interpretation in Article 347 that "The income of such trusts must be so included whether or not the trust was created before the enactment of this act" was in accordance with Section 1101 which provides that the Commissioner, with the approval of the Secretary shall prescribe and publish all needful rules and regulations for the enforcement of the Act. In United States v. Johnston, 124 United States 236, Brown v. United States 133—United States 671 and other cases, the courts held that if such interpretation has been in effect for a long period without objection and particularly if it has been relied upon by taxpayers, it will be followed, if the statute does not clearly require a different interpretation.

Although the Revenue Act of 1921 did not tax the income of trusts similar to those under consideration to the grantors (the indirect beneficiaries of the trust income)

still that right reposed in Congress to be exercised at any time, irrespective of when the trust was created.

[fol. 11] In 1923, an obligation was assumed by you to pay the premiums on the policies of insurance that you had taken out on your life and, by setting aside a fund, the income of which was to relieve you of that burden, you continued to be none the less the beneficiary of the trust fund. Therefore, the income of the trust fund was indirectly your income in so far as it was applied to paying the premiums of life insurance.

For the last contention mentioned above, you rely on the decision of the courts in the case of Nichols v. Coolidge, in which it was held that Section 402 (c) of the Revenue Act of 1918 is unconstitutional in so far as it requires that there shall be included in the gross estate of the decedent, the value of the property transferred irrevocably in trust for the decedent before the enactment of the Revenue Act of 1918, merely because the conveyance was intended to take effect in possession or enjoyment at or after death.

You are advised, however, that the Bureau has consistently held that the estate tax and the income tax being entirely separate, the action taken for Federal estate tax purposes is not necessarily controlling for income tax purposes.

The action of the examining officer is, accordingly, sustained.

There was included in the dividends reported in your return $10,279.85, representing liquidating dividends which are taxable as capital gain under the provisions of Article 1545 of Regulations 65. The amount has, therefore, been eliminated from dividends.

The above adjustments result in a net increase in dividends of $40,142.55.

2. Your capital net gain has been increased by $10,279.85, liquidating dividends as explained above.

[fol. 12] 1925

Ordinary net income, adjusted by Collector	$544,477.52
Add: 1. Increase in dividends	50,370.10
	$594,847.62
Deduct: 2. Increase in contributions	17,980.00
Ordinary net income adjusted	$576,858.62

Less:		
Dividends	$620,269.43	
Personal exemption	5,500.00	
		625,769.43
Income subject to normal tax		None
Surtax on $576,858.62		$107,031.72
Tax on 12½% on $69,556.60		8,694.57
Total tax		$115,726.29
Less:		
Earned income credit	$55.00	
Tax paid at source	1.00	
		56.00
Tax assessable		$115,670.29
Tax previously assessed		109,194.07
Deficiency in tax		$6,476.22

Explanation of Changes

1. The increase in dividends by $50,370.10 represents the amount paid in this year by the Wilmington Trust Company on insurance policies covering your life. The item has been included in gross income for reasons as explained under a similar adjustment for the year 1924.

[fol. 13] 2. A deduction of $96,084.27 was previously allowed for contributions, whereas the correct amount is $114,073.27, representing 15% of your total net income.

1926

Ordinary net income shown on return		$1,331,066.99
Add:		
1. Increase in interest		467.33
2. Increase in dividends		50,422.40
Net income adjusted		$1,381,956.72
Less:		
Dividends	$1,343,168.66	
Personal exemption	5,500.00	
		1,348,668.66
Income subject to normal tax		$33,288.06

Normal tax at 1½% on $4,000.00	60.00
Normal tax at 3% on $4,000.00	120.00
Normal tax at 5% on $25,288.06	1,264.40
Surtax on $1,381,956.72	268,051.34
Tax on 12½% on $1,101,412.50	137,676.56
Total tax	$407,172.30
Less earned income credit	181.25
Tax assessable	$406,991.05
Tax previously assessed	396,789.74
Deficiency	$10,201.31

Explanation of Changes

1. The interest reported by you has been increased by $467.33 representing interest received on a refund of Federal income taxes.

[fol. 14] 2. The increase in dividends by $50,422.40 has been previously explained in this letter.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

[fol. 15] Before United States Board of Tax Appeals

[Title omitted]

Answer—Filed January 7, 1929

Comes now the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and for answer to the petition of this taxpayer admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. Denies the allegations of error set forth in paragraph 4 of the petition.

5. Admits that during the years in question there was in force and effect a certain trust executed by the petitioner as grantor by the terms of which trust it was pro- [fol. 16] vided that the income should be applied on payment of premiums upon policies of insurance on the life of the petitioner, said policies of insurance being for purposes other than that specified in paragraph (10) (a) of Section 214 of the Revenue Acts of 1924 and 1926; that in the final determination the Commissioner included in the net income of the petitioner for the years in question certain amounts determined by the Commissioner to constitute that part of the income of said trust which was and which might be applied to the payment of premiums upon said policies of insurance on the life of said grantor; but for lack of sufficient information on which to form a belief denies all other allegations of fact contained in subparagraphs (a), (b), (c) and (e) of paragraph 5 of the petition. Admits the allegations contained in subparagraph (d) of paragraph 5 of the petition.

Denies each and every allegation of fact contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore it is prayed that the Commissioner's determination be approved and that the petition be dismissed and the appeal denied.

(Sgd.) C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: F. R. Shearer, Special Attorney, Bureau of Internal Revenue.

[fol. 17] Before United States Board of Tax Appeals

[Title omitted]

Motion for Leave to Amend Answer—Filed March 19, 1930

Comes now the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and moves for leave to amend the answer filed herein January 7, 1929, and that said answer be considered as amended as follows:

In lieu of the prayer for relief contained in said answer, insert the following:

"Respondent, fully relying upon the correctness of the Commissioner's final determination, but as an alternative and partial defense in respect of the calendar year 1925 alleges that in the final determination by the Commissioner of the deficiency for the year 1925 petitioner was allowed a deduction for contributions in the total amount of $114,073.27 representing 15 per cent of the petitioner's total net income for said year; that the petitioner's net income for the year 1925 as determined by the Commissioner, after the allowance of said deduction of $114,073.27 for contributions, was $576,858.62 ordinary net income and $69,556.60 capital net gain; and that if the Board should redetermine the petitioner's net income to be less than the amount so [fol. 18] determined by the Commissioner the deduction for contributions should be recomputed at an amount which does not exceed 15 per centum of the taxpayer's net income as so redetermined without the benefit of said deduction.

"Wherefore, it is prayed that the Commissioner's determination be approved, that the petition be dismissed and the appeal denied, and (in the alternative) that the Board redetermine the correct deficiency for 1925."

(Sgd.) C. M. Charest, General Counsel, Bureau of Internal Revenue.

[fol. 19] Before United States Board of Tax Appeals

Docket No. 41368

Irenee du Pont, Petitioner,

v.

Commissioner of Internal Revenue, Respondent

Trust—Income—Insurance.—Where the petitioner created trusts and the income therefrom was used for the purpose of paying life insurance premiums on his own life the income of the trusts should be included in petitioner's income under Section 219 (h) of the Revenue Acts of 1924 and 1926.

Kingman Brewster, Esq., and J. S. Y. Ivins, Esq., for the petitioner.

F. R. Shearer, Esq., for the respondent.

Findings of Fact and Opinion—Filed August 6, 1930

Deficiencies in income tax and surtax were determined by respondent as follows: 1924, $16,955.37; 1925. $6,476.22; 1926, $10,201.31, amounting in all to $33,632.90. The petitioner created several trust funds the income from which was used to pay life insurance premiums on his own life. This income, amounting to $50,422.40 for 1924, $50,370.10 for 1925, and $50,422.40 for 1926, was added to that of peti- [fol. 20] tioner by respondent, thus creating the deficiencies and this is alleged to be erroneous by petitioner in asking redetermination.

FINDINGS OF FACT

The petitioner, under date of September 18, 1923, executed nine trust agreements for the benefit of his wife, their nine children, and other members and relatives of his family. These trusts were irrevocable for their duration, which was in the first instance until December 18, 1926, with provision for further extension upon notice by the trustor to the trustee. Two such notices have been given and the trusts have been extended to December 18, 1932.

By the trust agreements, the petitioner transferred to the Wilmington Trust Company, as trustee, the following properties:

(a) Thirty two insurance policies on the petitioner's life.

(b) Eight hundred and thirty shares of 7 per cent preferred stock of the Christiana Securities Company, a corporation existing under the laws of the State of Delaware.

The nine trust agreements were in full force and effect during the years 1924-1926, inclusive, and the 32 insurance policies were likewise in full force and effect and held under the terms of the trust during those years.

The transfer of the insurance policies was absolute and complete. By the trust instruments the trustee was made the owner of such policies and, if the trusts terminated prior to the petitioner's death, all interest in the policies would vest in certain named beneficiaries. The petitioner is not one of such beneficiaries.

[fol. 21] If the petitioner dies prior to December 18, 1932 (or such other date to which the trusts might further be extended), the proceeds of the life insurance policies are to become a trust fund in the hands of the trustee, designated as the Primary Trust Fund. The net income therefrom and the fund itself would be distributed and paid over to named beneficiaries, other than the petitioner or his estate, as indicated in the trust agreements.

The petitioner retains no right to change the beneficiaries under the insurance policies named in the trust agreements. He has no right to surrender the policies for the surrender values indicated therein, nor to borrow against them. There is no provision under which title to the policies could revest in the taxpayer either at his own discretion or that of nim co-jointly with anybody else.

As to the shares of stock transferred under the trust agreements, the trustee receives the income from the securities, applies the same to the payment of taxes, governmental charges, and incidental expenses including its commissions, and uses the balance of the income for the payment of premiums on the policies of life insurance for the period of the trusts, or so long as the petitioner lives, whichever is the shorter.

If the trusts terminate prior to the petitioner's death, the securities and any income not paid out, all of which is designated the Secondary Trust Fund, are to be transferred to the petitioner. If the petitioner dies prior to the end of the trusts, the securities and any net income thereon are to be distributed to the nine children or their issue in the manner specified therein. No part of the Secondary Trust Fund in such case, goes to the petitioner's estate.

Such is the combined substantive effect of the provisions of the nine trust agreements. To simplify the description of the separate interest of each child dependent upon con-
[fol. 22] tingencies, nine distinct trusts (each applying to a one-ninth share in the trust funds) are provided for.

During the year 1924 dividends from securities transferred to and held by the Wilmington Trust Company as trustee, amounting to $50,422.40, were received by such trustee and, pursuant to the terms of the trusts, were used to pay insurance premiums. During the year 1925 dividends amounting to $50,370.10 and during the year 1926 dividends amounting to $50,422.40 were so received and

applied. These amounts have been treated by the Bureau as income taxable to the petitioner and subject to income taxes and surtaxes under the Revenue Acts of 1924 and 1926. This action is based upon the Commissioner's interpretation of Section 219 (h) of the Revenue Acts of 1924 and 1926.

The petitioner's wife and all the children, beneficiaries of the trust, were living during the years 1924 and 1926, and are still living.

OPINION

Black: The taxable years involved in this proceeding are 1924, 1925 and 1926 and hence are governed by the Revenue Acts of 1924 and 1926. Under Section 219 of each of these Acts it is provided that the tax shall be computed upon the net income of the estate or Trust and shall be paid by the fiduciary, except under certain conditions prescribed in subdivisions (g) and (h) of said Section.

In this proceeding we are not concerned with subdivision (g) and only with that part of subdivision (h) which reads as follows:

Where any part of the income of a trust is or may be applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance [fol. 23] irrevocably payable for the purposes and in the manner specified in paragraph (10) of subdivision (a) of section 214), such part of the income of the trust shall be included in computing the net income of the grantor.

The petitioner was the grantor of the trusts involved in this proceeding, the part of income of the Trust upon which the deficiencies are based was used to pay premiums on policies of insurance on the life of the grantor, and respondent has included such amounts in computing the net income of the grantor for the respective taxable years as is provided in Section 219 (h).

Petitioner attacks this determination of respondent on the following grounds: (1) subdivision (h) of Section 219 has no application to the income of an irrevocable trust; (2) even if the language of the subdivision does have application to an irrevocable trust, it does not have any application to an irrevocable trust created prior to the enactment of such subdivision; and (3) if said subdivision (h)

of Section 219 does have the application contended for by the Commissioner, it is unconstitutional and void because it is violative of the Fifth Amendment to the Constitution of the United States. Similar contentions have already been fully considered by the Board in Frederick B. Wells, 19 B. T. A. 1213, and Alfred F. Pillsbury, 19 B. T. A. 1229, and decided adversely to the contentions made by petitioner. See also Corliss v. Bowers, 281 U. S. 376.

Counsel for petitioner lay considerable stress in their brief on their contention that petitioner was under no obligation to pay premiums on the insurance policies assigned to the trustee, and that since the evidence shows that the policies had been irrevocably assigned to the trustee, the petitioner no longer had any interest in them. It is of course true that in an ordinary insurance policy, the in- [fol. 24] sured is under no legal obligation to pay the premiums due on a policy. If he fails to make the payments within the time prescribed in the policy, it lapses. But if he wants to keep the policies alive and in force he must make payment of the premiums. The policies of insurance involved in this proceeding were for the benefit of petitioner's wife and nine children. Evidently it was the desire of the petitioner to keep these policies alive and in full force. The expense involved in the payment of life insurance premiums by a husband and father on policies for the benefit of his wife and children is regarded as a personal expense by the internal revenue laws, and is not an allowable deduction in determining the net income of the taxpayer. If, by the method used in this proceeding, the petitioner can transfer to a trust the burden of paying these insurance premiums and secure the deduction that way, in so far as payment of surtaxes is concerned, then he has accomplished by indirect means that which the law would not permit him to accomplish directly. It was this sort of thing which Congress sought to prevent when it enacted the part of subdivision (h) of Section 219, Revenue Acts of 1924 and 1926, which we have quoted at the beginning of this opinion.

Under the authorities above cited,

Judgment will be entered for the respondent.

[fol. 25] BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 41368

IRENEE DU PONT, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DECISION—Filed August 7, 1930

Pursuant to the board's findings of fact and opinion, promulgated August 6, 1930, it is

Ordered and decided that there are deficiencies as follows:

Year	Deficiency
1924	$16,955.37
1925	6,476.22
1926	10,201.31

(Sgd.) Eugene Black, Member United States Board of Tax Appeals.

[fol. 26] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

PETITION FOR REVIEW OF THE DECISION OF THE UNITED STATES BOARD OF TAX APPEALS—Filed February 7, 1931

To the Circuit Court of Appeals for the Third Circuit:

Your petitioner, Irenee du Pont, respectfully shows:

I

This is a petition for review by the Circuit Court of Appeals of the Third Circuit of a decision of the United States Board of Tax Appeals promulgated August 6, 1930, and the final order in which was entered August 7, 1930, redetermining deficiencies in federal income taxes and/or surtaxes against the petitioner for the years 1924 to 1926, inclusive, in the following amounts:

[fol. 27] 1924	$16,955.37
1925	6,476.22
1926	10,201.31
Total	$33,632.90

II

Your petitioner resides in the County of New Castle in the State of Delaware and within the jurisdiction of the United States Circuit Court of Appeals for the Third Circuit.

III

The nature of the controversy before the Board of Tax Appeals was the determination of federal income and/or surtaxes under the Revenue Acts of 1924 and 1926 involving the question of whether Congress intended to, or could, under the Constitution, impose income taxes and/or surtaxes upon the petitioner with respect to dividends received by a trustee, under irrevocable trusts established by the petitioner, which dividends were applied by the trustee to the payment of premiums on policies of insurance on the petitioner's life.

IV

The errors committed by the Board of Tax Appeals upon which the petitioner relies as the basis for this proceeding are:

1. In holding that the petitioner maintained an interest in and/or received a benefit from policies of insurance absolutely and completely sold, assigned, transferred and set over unto the trustee by the trust indentures involved in [fol. 28] this case, and in not holding that the petitioner maintained no interest in and/or received no benefit from said policies of insurance.

2. In holding that Congress, by the enactment of subdivision (h) of Section 219 of the Revenue Acts of 1924 and 1926, sought to prevent the income, of the type of trust existing in this case, from being taxed to the fiduciary but instead sought to tax such income to the grantor of the trust,

and in not holding that Congress had no such intention but on the other hand intended to restrict the application of subdivision (h) of Section 219 of the Revenue Acts of 1924 and 1926 to revocable trusts the income from which is or may be applied to the payment of premiums upon policies of insurance on the life of the grantor.

3. In holding that subdivision (h) of Section 219 of the Revenue Acts of 1924 and 1926 applies to irrevocable trusts, the income from which is, or may be, applied to pay premiums upon policies of insurance taken out on the grantor's life, and in not holding that said section does not apply to such type of trusts.

4. In holding that subdivision (h) of Section 219 of the Revenue Acts of 1924 and 1926 applies to irrevocable trusts, the income from which is, or may be, applied to pay premiums upon policies of insurance taken out on the grantor's life, regardless of whether or not such irrevocable trusts were created prior to the enactment of such subdivision, and in not holding such distinction material.

5. In holding that subdivision (h) of Section 219 of the Revenue Acts of 1924 and 1926 is constitutional under the Fifth Amendment in so far as applied to the facts of this case, and in not holding that said section, so applied, is unconstitutional under such amendment.

[fol. 29] 6. In not holding that subdivision (h) of Section 219 of the Revenue Acts of 1924 and 1926, as applied to the facts of this case, is unconstitutional under Article 1, Section 9, of the Constitution.

7. In including in petitioner's taxable income for the year 1924 the sum of $50,422.40, for the year 1925 the sum of $50,370.10, and for the year 1926 the sum of $50,422.40, each amount representing income received by the trustee of the trusts, under consideration in this case, in the respective years involved, and in failing to exclude such amounts from the petitioner's income.

8. In finding deficiencies in federal income taxes and/or surtaxes in each of the years 1924, 1925 and 1926, and in failing to find that there were no deficiencies in petitioner's federal income taxes and/or surtaxes for such years.

Wherefore your petitioner prays that this Court may review the decision of the Board of Tax Appeals, reverse such decision, and direct the Board of Tax Appeals to enter a decision determining that there are no deficiencies in income taxes and/or surtaxes due from this petitioner for the years 1924, 1925 and 1926, and for such other and further relief as may to this Court appear proper in the premises.

(Sgd.) Kingman Brewster, Counsel for Petitioner, c/o Brewster & Ivins, 815 Fifteenth Street N. W., Washington, D. C.

[fol. 30] *Duly sworn to by O. R. Folsom-Jones. Jurat omitted in printing.*

[fol. 31] Before United States Board of Tax Appeals

[Title omitted]

Præcipe for Record—Filed April 28, 1931

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, and within the time prescribed by law, therefore, or such time as extended by order of the Board of Tax Appeals, transmit and deliver to the clerk of the Circuit Court of Appeals for the Eighth Circuit, copies duly certified of the following documents:

1. Docket entries of all proceedings before the Board of Tax Appeals.

2. All pleadings before the Board of Tax Appeals.

3. Findings of fact, opinion and decision of the Board of Tax Appeals.

4. Petition for review.

5. This præcipe for the record.

[fol. 32] The foregoing to be prepared, certified and transmitted as required by law and the rules of the Circuit Court of Appeals for the Third Circuit.

J. S. Y. Ivins, Counsel for Petitioner, % Brewster, Ivins & Phillips, 815 15th Street N. W., Washington, D. C.

Receipt of service of a copy of the foregoing præcipe for the record is hereby acknowledged this twenty-eighth day of April, 1931.

(Sgd.) C. M. Charest, General Counsel, Bureau of Internal Revenue.

[fol. 33] Before United States Board of Tax Appeals

[Title omitted]

Order Enlarging Time—Filed March 21, 1931

Upon motion of counsel for petitioner and consent of counsel for the respondent, it is

Ordered that the time for preparation of the evidence and for transmission and delivery of the record sur petition for review of the above-entitled proceeding in the United States Circuit Court of Appeals for the Third Circuit be and it is hereby extended to May 15, 1931.

(Sgd.) Logan Morris, Member.

Dated Washington, D. C., March 21, 1931.

[fol. 34] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 35] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1931

No. 4620 (List No. 73)

Irenee du Pont, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent

Appeal from the United States Board of Tax Appeals

Order Assigning Judges—Filed Dec. 3, 1931

And now, to-wit, this third day of December, A. D. 1931, it is ordered that Hon. Oliver B. Dickinson, District Judge for the Eastern District of Pennsylvania, and Hon. Nelson

McVicar, District Judge for the Western District of Pennsylvania, be, and they are hereby, assigned to sit in above case in order to make a full court.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

[fol. 36] Minute entry of argument and submission, December 3, 1931, omitted in printing.

[fol. 37] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1931

No. 4620

Irenee du Pont, Petitioner,

v.

Commissioner of Internal Revenue, Respondent

Petition for Review from the United States Board of Tax Appeals

Opinion—Filed January 6, 1933

Before Davis, Circuit Judge, and Dickinson and McVicar, District Judges

Davis, Circuit Judge:

This is a petition for review from an order of redetermination of the Board of Tax Appeals involving income taxes for 1924, 1925, and 1926. 20 B. T. A. 482.

On September 18, 1923, the petitioner executed nine trust agreements for the benefit of his family. According to the terms of the agreements, he transferred thirty-two policies insuring his life, and certain shares of stock, to the trustee. The trustee agreed to apply the income from the stock to the payment of the premiums on the insurance [fol. 38] policies and to defray the expenses of carrying the trusts, which were irrevocable for their term of duration with a provision for further extension, on notice by the grantor to the trustee, but it was optional whether or not the grantor would extend the term. The trusts expired,

for the first time, on December 18, 1926, and since that date he has twice ordered their renewal. The last extension expired on December 18, 1932.

If the trusts terminate before the death of the petitioner, all interest in the insurance policies will vest in certain beneficiaries of whom the petitioner is not one, but the stock will be returned to him. If the petitioner dies before the trusts terminate, the proceeds of the insurance policies will become a trust fund to be distributed under the terms of the agreement, and the stock likewise distributed to beneficiaries, other than the petitioner's estate named in the agreement.

The Commissioner of Internal Revenue, in accordance with his construction of section 219 (h) of the Revenue Acts of 1924 and 1926, treated the income of the trusts for the years 1924, 1925 and 1926 as taxable to the petitioner for those years. The Board of Tax Appeals approved the determination of the commissioner and entered its decision accordingly.

Section 219, which is the same in both acts, provides that the tax shall be computed on the net income of an estate or trust and shall be paid by the fiduciary with certain exceptions. One of these in subdivision (h) controls this case and is as follows:

"* * * where any part of the income of a trust is or may be applied to the payment of premiums upon policies of insurance on the life of the grantor [except policies of insurance irrevocably payable for the purposes and in the manner specified in paragraph (10) of subdivision (a) of section 214 (referring to charitable and philanthropic [fol. 39] gifts)] such part of the income of the trust shall be included in computing the net income of the grantor."

The petitioner contends that section 219 (h) is not applicable where the grantor of an irrevocable life insurance trust has parted with all rights and benefits under the trust prior to the Act; but that if Congress did intend it to apply, then section 219 (h) is unconstitutional under the facts of this case.

The petitioner, as above stated, executed trusts and assigned to the trustee a large amount of personal property, the income from which the trustee was to use to pay the premiums on policies of insurance on the life of the

grantor. The petitioner asserts that the statute does not apply because he divested himself of all interest in the trust funds and the insurance policies (for a period of three years). But "a trust" as used in the statute includes both revocable and irrevocable trusts with or without reserved powers in the grantor; and so any "trust" created by the grantor, if the income from it is or may be used to pay for insurance on his life, comes within the terms of the statute.

Section 219 (h) in full provides:

"Where any part of the income of a trust may, in the discretion of the grantor of the trust, either alone or in conjunction with any person not a beneficiary of the trust, be distributed to the grantor or be held or accumulated for future distribution to him, or where any part of the income of a trust is or may be applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in paragraph (10) of subdivision (a) of section 214), such part of the income of the trust shall be included in computing the net income of the grantor."

[fol. 40] The first part of the paragraph explicitly applies to the reservation of some power in the grantor of the trust; and, in the disjunctive, the second part has no limitation or reservation. Paragraph (g) of this section provides that income must be taxable to the grantor when he retains the power to revoke the trust at any time during the year and revest title in himself. In view of paragraph (g), the second part of paragraph (h) would have no purpose if it applies to revocable trusts only.

The intention of Congress as expressed in the exception in paragraph (h) concerning policies of insurance irrevocably payable for the purposes of charity or philanthropy is clear and unambiguous.

This intention may further be gathered from the following report of the Senate Committee on Finance on the Revenue Act of 1924.

"Section 219: This section has been rewritten in order to secure clarity and to prevent the evasion of taxes by means of estates and trusts.

(1) It is provided in this section that in the case of a trust where the trustee has the discretion to distribute or not, the income is taxed to the beneficiary if distributed and to the trustee if not distributed. The wording of subdivision (b) has been changed (1) to except from its provisions specifically subdivisions (g) and (h) which lay down special rules in lieu of the general provisions of subdivision (b); (2) to permit as an additional deduction that part of the gross income which, pursuant to the terms of the will or deed, is to be used exclusively for the prevention of cruelty to children or animals, since contributions by individuals to organizations for these purposes are deductible under section 214 (a) (10).

* * * * * * *

(3) Subdivision (h) of this section provides that the income of a trust which may be distributed to the grantor [fol. 41] or which may be used for the payment of premiums upon policies of insurance on his life shall be included in the gross income of the grantor. Trusts have been used to evade taxes by means of provisions allowing the distribution of the income to the grantor or its use for his benefit. The purpose of this subdivision of the bill is to stop this evasion.

The provisions of the House bill have been altered to exclude from taxation to the grantor of a trust income thereof used to pay premiums on insurance policies which are irrevocably payable to the benevolent organizations described in section 214 (a) (10). A trust of this kind is a proper method of providing for a gift to such organizations, and since the income is being used for these benevolent purposes rather than for the grantor's personal benefit it should not be taxed to him."

Senate Report No. 398, 68th Congress, First Session, page 25. House Report No. 179, 68th Congress, First Session, page 21.

Congress clearly intended to tax the income of such trusts to the grantor. Did it exceed its powers in doing so? The settlor says it did because he had neither a legal nor equitable title in the trust fund nor in the policies insuring his life to the payment of the premiums on which the income of the fund was applied. He contends that the

income of the trust fund was not his and to make the income of an irrevocable trust created before the enactment of the Revenue Acts of 1924 and 1926 taxable to him raises such serious doubts as to the constitutionality of section 219 (h) that such a construction should be avoided. He believes that section 219 (h) should be construed to apply only to trusts created after the act became effective.

But taxing to the grantor the income derived from the trusts in this case comes directly within the terms of the statute. It does not directly offend against any provision [fol. 42] of the Constitution and is in line with the general policy of taxation of the government which is concerned not so much with the refinements of title and interpretation as it is with the prevention of escape from taxation. The power of taxation is a fundamental necessity of government. Congress intended to establish a complete scheme for taxing income which must be carried out with due regard to substantial and practical results and must not be restricted by mere legal fiction. Tylor v. United States, 281 U. S. 497, 503. Corliss v. Bowers, 281 U. S. 376, 378. Old Colony Trust Company v. Commissioner, 279 U. S. 716.

No matter what is said, when we look at the result of the several transactions, the petitioner's income is reduced by the amount of the income of the trust funds. He has postponed his command over funds and policies for three years. While he has neither power over, nor title to, the funds nor a direct financial interest in the insurance policies, yet he is profiting by the arrangement, for he has seen to it that the income is to be applied to a purpose which he desired and required. But for his resorting to these legitimate devices which have many favorable features other than the one upon which he now insists, he would have continued paying the premiums on the insurance. He applied for and obtained the policies. He has merely postponed his right for the term of the trusts to command the fund and to terminate the existence of the contracts of insurance. Meanwhile, it is neither the trustee nor the beneficiaries of the policies who actually enjoy the taxable income but the petitioner himself. In its opinion the Board of Tax Appeals said:

"The expense involved in the payment of life insurance premiums by a husband and father on policies for the bene-

fit of his wife and children is regarded as a personal expense by the internal revenue laws, and is not an allowable [fol. 43] deduction in determining the net income of the taxpayer. If, by the method used in this proceeding, the petitioner can transfer to a trust the burden of paying these insurance premiums and secure the deduction that way, in so far as payment of surtaxes is concerned, then he has accomplished by indirect means that which the law would not permit him to accomplish directly."

The tax provided by section 219 (h) is placed upon income earned by the trust securities in so far as it may be used by the trustee to pay premiums on insurance on the life of the grantor. The insurance policies forming the trust res, or part of it, must be on the life of the person who executed the trust. This case is not like Hoeper v. Tax Commissioner, 284 U. S. 206, where the Court held that a State could not require a husband to include his wife's separate income in computing his income tax. There the husband had not owned, controlled or had the right to expend the money for his benefit and the case turned on the point that A could not be taxed on the basis of B's property.

The petitioner would reject the uniform construction of the commissioner and the Board of Tax Appeals because he believes that it amounts to taxing him with respect to property which is owned by another and in which he has no interest and so amounts to taking property without due process of law. But as we have pointed out section 219 (h) places the burden of the tax where it belongs, that is, on the one to whom it is income. Since it is income to the grantor, it would hardly be questioned that requiring him to report it as his was an unreasonable exercise of the taxing power contrary to the Fifth Amendment.

Nor does it appear that the income of the trust fund applied to the insurance should not be taxable to the grantor for the reason that the trusts were created prior to the effec- [fol. 44] tive date of the Revenue Acts of 1924 and 1926. The subject of the tax is income earned in 1924, 1925 and 1926. The statute affects income earned in those years. It does not impose a tax retroactively but presently and prospectively. Corliss v. Bowers, supra. Nichols v. Coolidge, 274 U. S. 521, and Coolidge v. Long, 282 U. S. 582, relate to the taxing of transfers of property completed before the

passage of the taxing act. The tax in this case is upon income realized from a trust fund during the taxable year.

The order of the Board of Tax Appeals is affirmed.

Dickinson, District Judge, dissents.

A true Copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 45] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1931

No. 4620

IRENEE DU PONT, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

JUDGMENT—Filed Jan. 6, 1933

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the order or decree of the said Board of Tax Appeals in this cause be, and the same is hereby, affirmed.

Philadelphia, January 6, 1933.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

[fol. 46] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 47] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 27, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,488. U. S. Circuit Court of Appeals, Third Circuit. Term No. 791. Irenee du Pont, petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed March 20, 1933. File No. 37,488.